

Silha Center Files Comments on Records Access

On Feb. 12, 2004, the Minnesota Supreme Court Advisory Committee convened a public hearing for comments on that committee's Rules of Public Access to Records of the Judicial Branch (Access Rules). If adopted, the Access Rules would allow electronic access to the state's court records.

Established by a Jan. 23, 2003 order from the Minnesota Supreme Court, the advisory committee was instructed to consider a report entitled "Public Access to Court Records: Guidelines for Policy Development by State Courts," which was originally prepared by the Conference of Chief Justices and Conference of State Court Administrators (The CCJ/COSCA Guidelines). After reviewing those documents, the Committee was to make recommendations concerning remote electronic access to court documents; which documents should be made available; what privacy protections should be considered; and what fees, if any, should be charged for such access.

The Silha Center has been active in the debate over remote access to court records. In 2001, the Silha Center filed comments regarding electronic access with the Judicial Conference of the United States, prepared by Silha Center director Prof. Jane Kirtley, with the assistance of graduate student Erik Ugland. In 2002, the Silha Center filed comments with the National Center for State Courts, prepared by Kirtley with the assistance of research assistant Kirsten Murphy.

Both documents are available on the Silha Center's Web page at <https://hsjmc.umn.edu/research-centers/centers/silha-center/silha-publications>. The 2001 document is available at <https://drive.google.com/file/d/1xSUZncEYyYsnEyRZXNKPKNz7TxnOnhpK/view>.

In February 2004, Kirtley again filed comments with the Minnesota Supreme Court, prepared by Kirtley with the assistance of Silha Fellow Doug Peters. Kirtley was invited to present the Silha Center's comments to the Committee at the February 12 hearing in St. Paul.

The Center's comments advocate electronic access to court records on the grounds that such records are public documents and should be readily accessible to the public. Making court records available in electronic form is the next logical step in a society where so much information is available electronically, and particularly where there is a trend towards handling all court filings electronically. The comments are available online at https://drive.google.com/file/d/1_jpgkOEU4OQ0nCd_tXAZnOzzqAlGoS4I/view.

The Silha Center's comments were based on the presumption that court records are public documents and therefore should be accessible to the public. This access is guaranteed by both common law and the First Amendment, supported by such cases as *Minneapolis Star & Tribune v. Schumacher*, 392 N.W. 2d 197 (Minn. 1986). *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986), and *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). The government, furthermore, cannot pick and choose who can and who cannot have access to court records, and therefore must provide equal access to them. In addition, modern technology is promoting a trend towards electronic courtrooms, where no paper records are generated. Although paper records are generally accessible to anyone willing to take the time to go to a courthouse to retrieve them, the growing trend to handling court matters electronically makes posting them to the World Wide Web a much simpler matter. "Here is the fundamental question," Kirtley was quoted in a Feb. 12, 2004 article in the St. Paul *Pioneer Press*, "Do we believe in public access or not?" She said that Minnesota's slow approach to making records available electronically "makes it harder to get the access we should."

The comments further addressed privacy concerns by stating that the law could be modified so that policies would be consistent for both paper and electronic records. Information such as social security numbers or information regarding minors would be redacted across the board, not just from electronic records.

The comments also noted that:

- Information that is public in one format should not become confidential when it is converted to another format.
- Redacting court records is feasible using current technology
- Remote access to court documents would reduce administrative burdens on court administrators, not increase them.

Once an effective redaction process is adopted, persons seeking court records would not have to burden court personnel with in-person requests for access and copies.

The hearing afforded an opportunity for groups on both sides of the issue to be heard. Besides Kirtley, who represented the Silha Center, other speakers advocating access included the Reporters Committee for Freedom of the Press, represented by Executive Director Lucy Dalglish; the *Minneapolis Star Tribune*, represented by reporter Chris Ison and John Borger, attorney with the law firm of Faegre and Benson; and Gary Hill, director of Investigations & Special Segments

KSTP-TV and Chair of the Freedom of Information Committee of the Minnesota Pro Chapter of the Society of Professional Journalists.

Ison and Hill both stated that electronic access was more convenient for reporters who often face problems parking and navigating a complicated bureaucratic system when trying to retrieve paper records from a courthouse. Immediate electronic access would enable reporters to check for the most recent and up-to-date information, allowing them to tell their readers, for example, that the charges against someone were dropped, and would aid in accuracy in reporting. When a person with a common name is apprehended, a quick check for a birth date or an address on a court record would enable a newspaper to correctly report that person's identity, they explained. Remote access to electronic court records also allows comprehensive studies of the data, so that trends — such as racial profiling or victims of crime — can be more easily spotted.

Many of those speaking against electronic access represented religious communities, and argued that remote access to criminal records would lead to discrimination against members of minority groups, particularly young men of color.

Citing studies that claimed Minnesota's prisons hold a disproportionate number of African American prisoners to whites, some speakers claimed that allowing electronic access to court records would perpetuate such discrimination. A statement submitted by the Most Reverend Harry J. Flynn, Archbishop of the Archdiocese of St. Paul and Minneapolis, read, "[R]acism is alive and well today in our nation and in our own state and, I believe, that the fact it remains in our midst, is one of America's and Minnesota's most serious and unresolved evils."

Other speakers argued that it is common practice for employers and landlords to search court records for information regarding applicants before hiring them or allowing them to rent property. Many landlords and employers cannot or will not make the distinction between a person charged with a crime and later found to be innocent and one later found to be guilty. Either way, they contended, the person arrested faces discrimination.

In her oral presentation at the hearing, Kirtley commented that the best way to deal with this problem would be to enforce laws against discrimination rather than to close off access to public records.

The advisory committee must make final recommendations to the Supreme Court by April 2, 2004. Additional information is on the Minnesota

Supreme Court's Web page at
http://www.courts.state.mn.us/cio/public_notices.htm.

— Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor